No. 92-466

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LIGGETT GROUP INC., NOW NAMED BROOKE GROUP LTD,
Petitioner,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF ITT CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus is ITT Corporation who, as the former parent of Continental Baking Company, has been embroiled since 1971 in federal court litigation concerning two price cuts on one item in Continental's bread line. *Wm. Inglis & Sons Baking Co.* v. *Continental Baking Co.*, 942 F.2d 1332 (9th Cir. 1991) ("*Inglis II*"). Pursuant to Supreme Court Rule 37, ITT respectfully submits this brief in favor of affirmance.

It was only in August of 1991 — twenty years after the complaint was filed — that the Ninth Circuit finally decided that Continental's two price cuts in the early 1970's did not violate Section 2 of the Sherman Act, or Section 2(a) of the Robinson-Patman Act. *Id.* at 1336-37. ITT has an obvious interest in ensuring that it does not suffer similar litigation in the future.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to adopt needed legal rules to govern predatory pricing cases. Under current law, firms make competitive price cuts at considerable hazard of long and expensive litigation. A reversal in this case would necessarily endorse legal rules that would have severe inhibiting effects on price competition by threatening companies that cut prices with interminable and expensive litigation.

An affirmance would give the Court the opportunity to lessen the anticompetitive potential of so-called predatory pricing cases by endorsing the basic legal propositions argued in this brief — (1) that the subjective intent of the defendant should be irrelevant, (2) that prices above marginal or incremental cost should be presumptively legal, and (3) that only a defendant who is likely to obtain monopoly power could reasonably hope to recoup its investment in a predatory campaign.

ARGUMENT

INTRODUCTION

National policy encourages firms to compete vigorously, particularly on the basis of price. Through this dynamic competitive process, inefficient competitors fail and stronger competitors emerge. If a firm develops a better product and its competitors cannot respond, it may lawfully, albeit temporarily, obtain a monopoly. Price competition is no different. A firm may cut price and expand output to meet the entire demand if it develops the means to bring a competitive product to market at a lower price. *See Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("prices that are below 'market price' or even below the costs of a firm's rivals, 'are not activity forbidden by the antitrust laws'"). On the contrary, "'it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'" *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986).

As most recently stated by the Court, "[t]he purpose of the [antitrust laws] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc.* v. *McQuillan*, 61 U.S.L.W. 4123, 4127 (Jan. 25, 1993). Antitrust law does not target "conduct which is competitive, even severely so." *Id.* Only "conduct which unfairly tends to destroy competition itself" is condemned. *Id.*

Imposing antitrust liability for reducing price may serve only to prevent more efficient firms from challenging less efficient rivals, effectively turning antitrust on its head. Indeed, if markets worked perfectly there would be no need for antitrust to be concerned with price cutting. As soon as a predator attempted to profit from the failure of his competitors by restricting output and raising price, new entrants would emerge to take advantage of those high profits.

However, markets are not perfect, and this Court has thus recognized that on rare occasions price cuts may eliminate equally efficient firms from the market, and entry barriers might enable the price cutter to exercise substantial market power for some time. Although theoretically price cutting may thus cause competitive harm, this Court has often recognized that such "predatory pricing schemes are rarely tried, and even more rarely successful." *Cargill*, 479 U.S. at 122 n.17 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). "[T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition." *Matsushita*, 475 U.S. at 589. In addition to the uncertainty of achieving the monopoly power needed to recoup short-run losses, a predator must also manage to retain that power "for long enough both to recoup the predator's losses and to harvest some additional gain." *Id.*

Courts must take great care to ensure that "'a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior [should not be permitted to] discourag[e] legitimate price competition.'" *Id.* at 594; *see Cargill*, 479 U.S. at 121 n.17. "[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Firms that make an honest business judgment that they could increase profits by expanding output and reducing price should not be compelled to hesitate because of fear that they will have to defend their action in the courts through years of antitrust litigation. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield*, 495 U.S. at 340.

It remains for the Court to incorporate its concerns for vigorous price competition into the legal rules applicable to

claims of predatory pricing and, specifically, the evidence necessary to enable a plaintiff to reach the jury. Amicus urges this Court to hold that objective facts alone are relevant to distinguishing vigorous price competition from the rare instance of truly predatory pricing. Evidence of defendant's subjective intent should never be relevant in these cases since all business rivals necessarily hope to increase their sales at the expense of their competitors' sales when they reduce price.

The relevant objective facts relate to defendant's costs, and to its market position. Plaintiff should be required to show that the added out-of-pocket costs that defendant incurred in making the sales complained of exceeded the revenues generated by those sales; *i.e.*, that defendant's short-run marginal costs exceeded marginal revenue. Plaintiff should also be required to prove that the low prices complained of had resulted, or would result, in market power sufficient to enable the defendant to prevent price competition for a period long enough to more than recoup out-of-pocket losses incurred during the period of the alleged predation.

Adoption of these objective standards would provide the lower courts with the means necessary to control this wasteful (practically no plaintiff ever recovers), and obviously competition-inhibiting, litigation.

I. EVIDENCE OF INTENT SHOULD PLAY NO ROLE IN EVALUATING A FIRM'S DECISION TO CUT PRICE.

Antitrust law seeks to punish practices that harm competition, not competitors. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Indeed, it encourages firms to "harm" their competitors in order to attract more consumers to their own products. In the context of agreements in restraint of trade, for example, a price-fixing

agreement among all firms in the market harms competition, but benefits the conspiring competitors.

When dealing with single firm behavior where there is no clear suppression of competition, the distinction is often more difficult. A large firm's refusal to deal with a rival, or a decision to cut price, surely harms the competitor, but may actually increase competition. When dealing with some types of potentially anticompetitive practices (e.g., refusals to deal), the firm's intent may help courts to distinguish between procompetitive and anticompetitive behavior.[1]

In price-cutting cases, however, intent should be irrelevant to the analysis. *See A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 714.2 at 677-78 (Supp. 1992). To be sure, a firm engaged in willful predatory pricing intends to harm its competitors, but so does a firm whose price cuts are not "predatory." A firm's goal in cutting price is always to expand its own output as much as possible at the expense of its competitors, and an attempt to exclude rivals is thus fairly characterized as predatory only if the attempt is grounded "'on some basis other than [superior] efficiency.'" *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting R. Bork, *The Antitrust Paradox* at 138 (1978)).

[1] For example, a firm operating a ski mountain may refuse to sell a joint lift ticket with another ski company because it believes that the facilities on the other company's mountain are unsafe. *Cf. Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609-10 (1985). Such a decision could encourage the competitor to improve the quality of its equipment, benefiting the competitive process. Conversely, a firm could refuse to deal simply in hopes of driving the other from the market. The firm's intent has obvious relevance to a court or jury attempting to draw this distinction.

In this case, Liggett argues that various internal documents demonstrate that B&W offered volume discounts in hopes of discouraging Liggett from engaging in price competition. Brief for Petitioner ("Pet. Br.") at 37. But this evidence of intent provides no relevant information about the issues of concern under the antitrust laws. If B&W could charge lower prices and still recover its added costs, or if B&W would not be able to prevent price competition after its allegedly predatory campaign, consumers benefit both in the short- and the long-term, and B&W's actions should not be discouraged by the threat of antitrust sanction.

The issue for the courts is thus not whether B&W intended to increase its own profits by disciplining Liggett, but whether it sought to do so through anticompetitive means. When price cutting is the charge, conduct is anticompetitive only if costs exceed revenues so that equally efficient rivals are threatened, and if the defendant would have sufficient market power after the predation period to permit it at that time to restrict output and raise price long enough to recover the losses incurred by reason of its low prices. Evidence of subjective intent does nothing to elucidate these issues.

II. AN ANTITRUST PLAINTIFF SHOULD BE REQUIRED TO DEMONSTRATE THAT THE DEFENDANT'S PRICE WAS LESS THAN THE INCREMENTAL COST OF PRODUCING THE ADDITIONAL UNITS IT WAS ABLE TO SELL BECAUSE OF ITS LOWER PRICE.

Since *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), indicated that a cost/price relationship could be used by plaintiffs in predatory pricing cases to prove anticompetitive effect, the lower courts have been left to "struggle with the appropriate price-cost relation." *A.A. Poultry Farms*, 881 F.2d at 1400. Questions have included what cost is relevant, what is its evidentiary impact, and what products are to be included in the computation. Each of these

questions is presented by Petitioner's claim. None apparently has been addressed to date in this litigation.

A. Predatory Pricing Cases Should Not Reach The Jury Where Prices Exceed Short-Run Marginal, or Incremental, Cost.

Beginning with *Utah Pie* in 1967, and with considerable impetus from an influential article a few years later, P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975), plaintiffs in predatory pricing cases have relied almost exclusively on evidence of defendant's cost/price relationship to carry their burden of proving competitive injury. The lower courts have not, however, been afforded directions by this Court as to the type of cost evidence that is probative of a lessening of competition.[2] Without this guidance, the result has been decisions in the different circuits, sometimes conflicting,[3] which have left trial courts without the analytical framework necessary to separate those cases which should reach juries and those that should not.

Several circuits require that plaintiff prove that defendant's prices were below the incremental cost of making the sales complained of. *E.g.*, *Inglis II*, 942 F.2d at 1336; *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *D.E. Rogers Assocs., Inc.*

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[2] The Court has simply suggested that a low price could be evidence of predatory behavior if it is "below the level necessary to sell" the product or "below some appropriate measure of cost," *Matsushita*, 475 U.S. at 585 n.8, and has declined "to 'consider whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost'[. . .] or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation." *Cargill*, 479 U.S. at 117-18 n.12 (quoting *Matsushita*, 475 U.S. at 585 n.9).

[3] This Court twice noted in 1986 the conflict in the circuits as to what the relevant cost measure is. *Cargill*, 479 U.S. at 117 n. 12; *Matsushita*, 475 U.S. at 585 n.9. The conflict remains.

v. *Gardner-Denver Co.*, 718 F.2d 1431, 1435 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984). At least one circuit has declined to define the relevant cost measure, *Barry Wright Corp.*, 724 F.2d at 233 (1st Cir. 1983), and others have held that which costs were variable is a jury question. *E.g.*, *McGahee* v. *Northern Propane Gas Co.*, 858 F.2d 1487, 1504 n.38 (11th Cir. 1987), *cert. denied*, 490 U.S. 1084 (1989); *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1038 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) ("*Inglis I*"); *Kelco Disposal, Inc.* v. *Browning-Ferris Indus.*, 845 F.2d 404, 408 (2d Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989); *Adjusters Replace-a-Car, Inc.* v. *Agency Rent-a-Car, Inc.*, 735 F.2d 884, 891 n.6 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).[4] In the present case, the court apparently followed a categorical approach as advocated in 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 715, at 173 (1978); App. 30a, n.29. Under this approach, costs which are commonly classified as variable over some appreciable term are considered the relevant costs, without regard to whether they increased because of the complained of sales.

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[4] This approach has been cogently described as the "approach with the greatest potential for insupportable results" and "entirely unworkable". P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.1d at 635 (Supp. 1992). The authors go on to point out that, if the cost standard is left to the jury, "[t]hese cases, already complex enough, would thereby be complicated beyond the point of understanding. Moreover, if the instructions are as general as they are likely to be, the jury will not know what to do, and the legal system will be no better off than in the days when predatory pricing claims were submitted to juries without any intelligible governing legal standard." *Id.*

The experience in *Inglis* and other cases, including apparently the instant case, makes it plain that it is not a daunting task for plaintiff's "expert" to identify sufficient categories of defendant's costs as "variable" to yield an average variable cost figure higher than price. Defendant's "expert" then does the opposite. Juries are totally unequipped to deal with such testimony. It should be a function of the trial court to identify, as a matter of law, the relevant cost standard.

Effective administration of predatory pricing cases requires delineation by this Court of those costs that are relevant to the cost/price comparison, and what the evidentiary impact of this evidence is.

1. ***Appropriate Measure of Cost.*** Short-run "marginal" and "incremental" costs are terms used interchangeably to refer to the costs associated with the last unit of output.[5] Prices that are above marginal, or incremental, cost add to profit; the revenue they produce exceeds the costs incurred in producing the revenue. These prices thus add to profit. In the short run, which is all the courts can hope sensibly to assess, *Northeastern Tel.*, 651 F.2d at 87 n.15, prices above incremental cost do not require recoupment. "Marginal cost pricing . . . fosters competition on the basis of relative efficiency. Establishing a pricing floor above marginal cost would encourage underutilization of productive resources and would provide a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." *Id.* at 87.

Short-run marginal, or incremental, cost thus provides a useful objective standard by which to measure a plaintiff's claim that defendant's conduct was predatory. It is a standard which recognizes that no added costs are incurred by utilizing idle resources, and which threatens only those firms that "are relatively inefficient." *Atlantic Richfield*, 495 U.S. at 337-38 n.7. This standard also provides reliable circumstantial evidence of intent since there are normally many reasons to sell at prices above marginal cost, and virtually none to sell at prices beneath it.

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[5] "Marginal cost, which is the incremental cost of producing the next unit, is the 'competitive standard'." P. Areeda, *Predatory Pricing* (1980), 49 Antitrust L.J. 897, 902 (1980). What is the "next unit" will depend on the transaction that is complained of.

Contrary to expressions in some decisions and legal literature that incremental costs "can seldom be measured in litigation," P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 715 at 699 (Supp. 1992); *Adjusters Replace-A-Car*, 735 F.2d at 889, such costs are commonly used by firms in many contexts (*e.g.*, bidding on new projects) and are quite easy to calculate. *See, e.g.*, C. Horngren G. Foster, *Cost Accounting: A Managerial Emphasis* 414 (7th ed. 1991); A. Matz & M. Usry, *Cost Accounting: Planning and Control* 624 (8th ed. 1984). For example, in *Inglis II*, the record contained substantial evidence that both parties, and every other wholesale baker in the market, were able to compute precisely its marginal costs of selling one pound private label bread, the item in issue in that case. The record in *Utah Pie* also reflected Continental's marginal cost of producing frozen fruit pies in California, shipping them to Salt Lake City, and selling them there. *Utah Pie*, 386 U.S. at 698. The court also had the defendant's marginal cost available to it in *Marsann Co.* v. *Brammall*, 788 F.2d 611 (9th Cir. 1986). *See also D.E. Rogers Assocs.*, 718 F.2d at 1437.

In the present case, Liggett appears to have made no effort to prove that prices were below the incremental costs associated with B&W's high volume discounts. These incremental costs were not considered by the courts below, and apparently were never computed. Instead, both parties seem to have assumed that an average variable cost figure computed by adding up the costs carried on the defendant's books in various categories, and dividing by total output, was the proper cost standard. This approach, as noted, yields nothing but conflicting testimony by "experts" — as in this case — which is totally beyond the ability of juries to appraise, and results in a cost figure that would not have been considered in making the business decision complained of.

2. ***The Significance of the Cost/Price Comparison.*** The Eleventh Circuit has held explicitly that prices below total cost, but above marginal cost, may be considered as

circumstantial evidence of predatory intent. *McGahee*, 858 F.2d at 1503. A number of other circuits reach a comparable result by permitting evidence of prices above incremental cost to be considered, along with other evidence, as evidence of predation. *Inglis I*, 668 F.2d at 1035; *Henry* v. *Chloride Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987); *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *D.E. Rogers Assocs.*, 718 F.2d at 1437. The significance of the cost evidence was expressly left open in *Barry Wright Corp.*, 724 F.2d at 233, and one circuit has even held that evidence of prices above full cost can be probative of predatory pricing. *Transamerica Computer Co.* v. *I.B.M. Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). Other circuits have disagreed. *Barry Wright Corp.*, 724 F.2d at 233; *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

Permitting plaintiffs to reach juries simply on evidence that defendant's prices were below total cost but above incremental cost, or on that evidence plus evidence of defendant's intent to take sales away from its competitors, is bad law and bad social policy. It is bad law because circumstantial evidence that logically supports two conflicting inferences proves neither. *See Matsushita*, 475 U.S. at 596-97; *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984). Because there are so many normal business reasons to sell at prices that recover costs incurred, the fact is that profit-maximization is a far more logical inference to draw from prices above incremental cost than is an inference of predatory intent. And evidence of an intent to take sales away from defendant's competitors should not be enough to permit the opposite inference since, as noted, such an intent is a normal by-product of the competitive process.

Permitting juries to condemn prices above incremental cost is bad social and economic policy, not only because it greatly encourages this type of litigation, but also because it

must inevitably inhibit such normal output-enhancing competitive efforts as promotional pricing and maximum utilization of resources. By presuming, as a matter of law, that prices above marginal cost do not raise antitrust concerns, the courts would ensure that the basic antitrust purpose -- to enhance output to the benefit of consumers -- is furthered.

B. The Record In This Case Is Insufficient To Permit A Predatory Pricing Case To Reach The Jury.

For at least two reasons, the record in this case is insufficient to permit a jury to infer predatory intent. To support a rational inference of predatory intent, the cost/price evidence obviously must reflect the realities of the choice confronting the businessman charged with harboring such intent. This means that the costs that are compared to the price must be those that foreseeably would increase as a result of charging the allegedly predatory price.

This record appears to contain no evidence at all from which the Court could ascertain the added costs that B&W foreseeably would incur by reason of its decision to grant discounts to high-volume wholesalers. Liggett's brief cites no such evidence, and merely quotes one opaque passage as an "admission" of B&W's expert:

> "Pretax trading profit was negative. Therefore, if you disregard financial consequences other than direct sales revenue, [*i.e.*, reduced taxes on other profits] in what you refer to as price the answer would be that prices are below average variable cost."

Pet. Br. at 14. In addition, the trial court's opinion recites that there was testimony of an expert hired by Liggett that

B&W's prices on its generic line were below its average variable costs. App. 45a.

The case appears to have been tried by both sides on the theory that the costs relevant to Liggett's predatory pricing charge were average variable costs, defined in some categorical manner, App. 30a, n. 29, on B&W's entire generic product line. Nowhere in the briefs or opinions is there any statement as to what costs were included in the two sides' calculations, and there is no evidence at all that either side focused on the added costs that were incurred as a result of the sales of black-and-white cigarettes to high volume wholesalers.

The second reason why the evidence relied upon by Liggett does not rationally support a likelihood of competitive injury is that the price it complains of was limited to only one item in the product line of both B&W and of Liggett. Plainly, B&W's low price on just black-and-white cigarettes could not reasonably be found to have been intended to drive out a full-line producer such as Liggett.[6] The lower courts and the Federal Trade Commission have consistently rejected inferences of competitive injury where plaintiff's evidence of a cost/price relationship was limited to one item in the competitors' product lines. *Morgan* v. *Ponder*, 892 F.2d 1355, 1361-62 (8th Cir. 1989); *Bayou Bottling, Inc.* v. *Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984); *Buffalo-Courier Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 57 (2d Cir. 1979); *International Tel. & Tel. Corp.*, 104 F.T.C. 280, 425-27 (1984).

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[6] Only if the one low-priced item was such an important part of the entire product line that it resulted in the entire line being sold below the relevant cost measure could the one price alone rationally support an inference of predation. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 856-57 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

The proof in this case appears to have failed to satisfy either of these criteria. Reversal of the decision below could only be read by bench and bar to hold that "below cost" means below the total of various categories of cost that are usually considered "variable" (over some unstated period of time longer than the short run), divided by output. Reversal would also necessarily be read as endorsing plaintiffs' consistent efforts in these cases to base their charges on only the lowest priced item in the product line. Reversal on this record would thus virtually guarantee every plaintiff access to a jury in a case alleging predatory pricing.

III. AN ANTITRUST PLAINTIFF SHOULD BE REQUIRED TO DEMONSTRATE THAT A PRICE-CUTTING DEFENDANT OBTAINED MONOPOLY POWER, OR CAME DANGEROUSLY CLOSE TO MONOPOLIZING THE RELEVANT MARKET, IN ORDER TO PROVE THAT PRICE CUTTING VIOLATED THE ANTITRUST LAWS.

The ultimate question in any price-cutting case is whether competition could be harmed. Unlike other potentially anticompetitive practices, price cutting always benefits consumers in the short run. "[I]ndeed, 'cutting prices in order to increase business often is the very essence of competition" *Atlantic Richfield*, 495 U.S. at 338 (quoting *Matsushita*, 475 U.S. at 594). To determine whether price cutting may have long-run anticompetitive consequences, courts must ask whether the alleged predator could recoup the cost of its allegedly predatory campaign. If not, the behavior benefits consumers, irrespective of the price/cost ratio and should not be deterred by the antitrust laws. *A.A. Poultry*, 881 F.2d at 1401.

One of the basic issues raised in this case is what proof is required to demonstrate that recoupment was plausible, *i.e.*, that an injury to competition either occurred or was

dangerously likely. Liggett contends that evidence that prices rose on the black-and-white items in the line of generic cigarettes, combined with internal documents in which B&W stated that it would profit if prices rose, is sufficient evidence that B&W's price cutting threatened competition.

This Court should reject Liggett's theory of competitive injury because it would permit the jury to infer predatory pricing any time prices rose following a price war (which they always do), and the defendant had foreseen that result. The mere fact that prices rise in no way indicates that a predatory campaign was successful, and permitting juries to so infer would surely discourage procompetitive behavior.

Amicus urges this Court to adopt, in accordance with numerous courts of appeal that have considered the issue,[7] the standard for competitive injury that is applicable in Section 2 Sherman Act cases. This Court has taken great care "to avoid constructions of §2 which might chill competition, rather than foster it." *Spectrum Sports*, 61 U.S.L.W. at 4127. Recognizing the difficulty inherent in distinguishing "robust competition from conduct with long-term anticompetitive effects," the Court has carefully limited liability in such cases to instances of monopolization or a dangerous threat thereof. *Id.* "Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

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[7] *See Inglis II*, 942 F.2d at 1337; *Stitt Spark Plug Co.* v. *Champion Spark Plug Co.*, 840 F.2d 1253, 1255 (5th Cir.), *cert. denied*, 488 U.S. 890 (1988); *Henry* v. *Chloride*, 809 F.2d at 1345; *D.E. Rogers Assocs.*, 718 F.2d at 1439; *Pacific Eng'g & Prod. Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Jays Foods, Inc.* v. *Frito-Lay, Inc.*, 656 F. Supp. 843, 846 (N.D. Ill. 1987); *aff'd without opinion*, 860 F.2d 1082 (7th Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989).

The Court's reasoning is no less compelling in a predatory pricing case under Section 2(a) of the Robinson-Patman Act. Although "the Sherman Act speaks of attempt to monopolize, while Robinson-Patman is aimed at lessening of competition," the two linguistic formulations target the same result. *Henry* v. *Chloride*, 809 F.2d at 1345. "[I]n order to lessen competition, a defendant must be able to create a real possibility of both driving out a rival by loss-creating price cutting and then holding on to that advantage to recoup losses. . . . [I]f other rivals can with reasonable ease take the place of any competitors knocked out -- competition is not seriously or permanently damaged." *Id.* Only monopoly power can render recoupment a reasonable possibility.

B&W had no hope of obtaining monopoly power (or of agreeing to share such power with the larger firms in the industry). Liggett argues, however, that when the defendant is a participant in an oligopoly, even a firm without monopoly power may substantially lessen competition by disciplining a price cutter and returning the industry to its prior oligopolistic pricing structure. Without a substantial prospect that the predator could obtain monopoly power or come dangerously close to doing so, however, the possibility that defendant priced as it did on the assumption that it could recoup its investment is pure speculation without an evidentiary basis. Any of the other firms in the market could at any time reduce price. That they might do so is particularly likely where, as in the tobacco industry, there is excess capacity, the utilization of which will increase profits. Indeed, this appears to have happened as firms entered the generic cigarette market and introduced "sub-generic" brands priced even lower than black-and-white cigarettes had been. J.A. 326.

Given the grave risks inherent in a predatory campaign by a relatively small participant in an oligopoly, it is implausible that one would try. Moreover, the legal rule that Liggett requests would have the perverse results of

discouraging the sort of price competition initiated by B&W in this case, and of encouraging this type of litigation. Thousands of companies in hundreds of industries with a small number of participants could be forced to submit to burdensome discovery and a jury trial for instituting a price war and later increasing prices. The cost to the economy of such disruption is surely not worth the benefit of preventing the rare predatory campaign in which an oligopolistic market simply returns to business as usual.

Liggett also argues that Congress explicitly rejected the Sherman Act competitive injury standard by incorporating incipiency language into Section 2(a) of the Robinson-Patman Act that is not present in Section 2 of the Sherman Act. Pet. Br. at 26. For this reason, Liggett contends, the injury to competition required in predatory pricing cases under the Robinson-Patman Act must be less than that required under the Sherman Act. But this Court has long maintained that the broad language of the Robinson-Patman Act must be reconciled "with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74 (1953); *see Great Atlantic & Pacific Tea Co.*, v. *FTC*, 440 U.S. 69, 80 n.13 (1979). Moreover, the Court recently applied the well-established Sherman Act standard to determine whether competitive injury was likely to result from predatory pricing under Section 7 of the Clayton Act, a statute containing incipiency language virtually identical to that in Section 2(a) of the Robinson-Patman Act. *See Cargill*, 479 U.S. 104.

In *Cargill*, the plaintiff contended that, if a proposed merger went forward, the merged firm ("Excel") "would bid up the price it would pay for cattle, and reduce the price at which it sold boxed beef. Although such a strategy . . . would reduce Excel's profits, Excel's parent corporation had the financial reserves to enable Excel to pursue such a strategy." *Cargill*, 479 U.S. at 114. The plaintiff argued that eventually "smaller competitors lacking significant

reserves and unable to match Excel's prices would be driven from the market; at this point Excel would raise the price of its boxed beef to supracompetitive levels, and would more than recoup the profits it lost during the initial phase." *Id.*

Although the Court in *Cargill* did not take a position on the appropriate price/cost ratio, it emphasized that the evidence would likely have been insufficient to establish predatory pricing, because the likelihood of recoupment was remote. Without a share of market capacity in the 60% range or "a plan to collude," the Court stated, the defendant "would harm only itself by embarking on a sustained campaign of predatory pricing." *Id.* at 120 n.15. Justice Stevens, in dissent, asserted the view — which the majority did not dispute — that the Court's decision "in practical effect" holds that predatory pricing could not be shown in a Section 7 case "unless the actual or probable conduct of the merged firms would establish a violation of the Sherman Act." *Cargill*, 479 U.S. at 123 n.1 (Stevens, J., dissenting).

CONCLUSION

For the reasons set forth above, the Court should adopt objective and clear legal standards to govern predatory pricing cases and affirm the decision of the Fourth Circuit.

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